

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

1 QUINAS YVETTE SMITH)
2 Plaintiff,) No. CV-10-0421-CI
3 v.) ORDER DENYING PLAINTIFF'S
4 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
5 of Social Security,) AND GRANTING DEFENDANT'S
6 Defendant.) MOTION FOR SUMMARY JUDGMENT
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12 BEFORE THE COURT are cross-Motions for Summary Judgment (ECF
13 No. 13, 15.) Attorney Maureen J. Rosette represents Quinas Y. Smith
14 (Plaintiff); Special Assistant United States Attorney Mathew W. Pile
15 represents the Commissioner of Social Security (Defendant). The
16 parties have consented to proceed before a magistrate judge. (ECF
17 No. 7.) After reviewing the administrative record and briefs filed
18 by the parties, the court **DENIES** Plaintiff's Motion for Summary
19 Judgment, and directs entry of judgment for Defendant.

20 **JURISDICTION**

21 Plaintiff protectively filed for Supplemental Security Income
22 (SSI) on April 6, 2007. (Tr. 14, 136.) She alleged disability due
23 to "asthma, bleeding ulcers, acid reflux, bipolar, mental health,
24 insomnia, HBP [high blood pressure], paranoid around lots of people,
25 hears voices, mind races," with an onset date of November 6, 2006.
(Tr. 129.) Her claim was denied initially and on reconsideration.
26 Plaintiff requested a hearing before an administrative law judge
27 (ALJ), which was held on January 15, 2009, before ALJ Paul Gaughen.

1 Plaintiff, who appeared with counsel, medical expert Thomas
 2 McKnight, Jr., Ph.D., and vocational expert Sharon N. Welter
 3 testified. (Tr. 25-72.) On February 27, 2009, the ALJ denied
 4 benefits; the Appeals Council denied review. (Tr. 14-24.) Upon
 5 denial of review of the ALJ's decision by the Appeals Council, (Tr.
 6 4-6), Plaintiff lodged this appeal pursuant to 42 U.S.C. § 405(g).

7 **STANDARD OF REVIEW**

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 9 court set out the standard of review:

10 A district court's order upholding the Commissioner's
 11 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 12 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 13 Commissioner may be reversed only if it is not supported
 14 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 15 Substantial evidence is defined as being more than a mere
 16 scintilla, but less than a preponderance. *Id.* at 1098.
 17 Put another way, substantial evidence is such relevant
 18 evidence as a reasonable mind might accept as adequate to
 19 support a conclusion. *Richardson v. Perales*, 402 U.S.
 20 389, 401 (1971). If the evidence is susceptible to more
 21 than one rational interpretation, the court may not
 22 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

23 The ALJ is responsible for determining credibility,
 24 resolving conflicts in medical testimony, and resolving
 25 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 26 Cir. 1995). The ALJ's determinations of law are reviewed
 27 *de novo*, although deference is owed to a reasonable
 28 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

23 It is the role of the trier of fact, not this court, to resolve
 24 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 25 supports more than one rational interpretation, the court may not
 26 substitute its judgment for that of the Commissioner. *Tackett*, 180
 27 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 28 Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in
2 weighing the evidence and making the decision. *Brawner v. Secretary*
3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
4 there is substantial evidence to support the administrative
5 findings, or if there is conflicting evidence that will support a
6 finding of either disability or non-disability, the finding of the
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
8 1230 (9th Cir. 1987).

9 **SEQUENTIAL EVALUATION**

10 The Commissioner has established a five-step sequential
11 evaluation process for determining whether a person is disabled. 20
12 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
13 137, 140-42 (1987). In steps one through four, the burden of proof
14 rests upon the claimant to establish a *prima facie* case of
15 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
16 920, 921 (9th Cir. 1971). This burden is met once a claimant
17 establishes that a physical or mental impairment prevents her from
18 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),
19 416.920(a). If a claimant establishes she cannot do her past
20 relevant work, the ALJ proceeds to step five, and the burden shifts
21 to the Commissioner to show that (1) the claimant can make an
22 adjustment to other work; and (2) specific jobs exist in the
23 national economy which claimant can perform. 20 C.F.R. §§
24 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
25 1497-98 (9th Cir. 1984). If a claimant cannot perform other work in
26 the national economy, she is disabled and eligible for benefits. 20
27 C.F.R. §§ 404.1520(g), 416.920(g).

28 Special statutes and regulations govern disability claims that

1 involve drug and alcohol addiction (DAA). 42 U.S.C.
 2 § 423(d)(2)(C)(Contract with America Advancement Act of 1996
 3 (CAAA)). The CAAA amended the definition of "disability" under the
 4 Social Security Act, providing that an individual is not disabled
 5 for purposes of social security benefits if DAA is material to the
 6 disability. *Parra v. Astrue*, 481 F.3d 742, 748 (9th Cir. 2007).
 7 Under the Commissioner's regulations (Regulations) an ALJ must
 8 follow a specific analysis that incorporates the sequential
 9 evaluation discussed above. 20 C.F.R. §§ 404.1535(a), 416.935(a).
 10 The ALJ first must conduct the five-step inquiry without attempting
 11 to determine the impact of a substance abuse/addiction disorder. If
 12 the ALJ finds that the claimant is not disabled under the five-step
 13 inquiry, the claimant is not entitled to benefits, and there is no
 14 need to proceed with further analysis. *Id.* If the ALJ finds the
 15 claimant disabled, and there is evidence of DAA, the ALJ should
 16 proceed with a second sequential evaluation and §§ 404.1535 or
 17 416.935 to determine if the claimant would still be disabled absent
 18 the DAA. *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001).
 19 If found disabled with the effects of DAA, the claimant has the
 20 burden in steps one through four of the second sequential evaluation
 21 process to prove drug or alcohol abuse is not a contributing factor
 22 material to her disability. *Parra*, 481 F.3d at 748.

23 A claimant must provide competent evidence of a period of
 24 abstinence and medical source opinions relating to that period
 25 sufficient to establish DAA is not a contributing factor material to
 26 allegedly disabling impairments. *Id.* at 748-49.

27 **STATEMENT OF THE CASE**

28 The facts of the case are set forth in detail in the transcript

1 of proceedings and are briefly summarized here. Plaintiff was 41
2 years old at the time of the hearing in January 2009. (Tr. 43.)
3 She testified she quit high school in the 12th grade and did not
4 obtain a GED. Plaintiff has a history of drug addiction, alcohol
5 abuse and incarceration for minor theft convictions. (Tr. 244.)
6 She testified she has been in DAA treatment several times and takes
7 medication for her mental conditions. (Tr. 38, 58.) Plaintiff
8 reported she has three daughters. Her sixteen year old, who is
9 receiving SSI benefits, lives with her. Plaintiff stated she last
10 worked as an inventory clerk but quit due to an emergency surgery.
11 (Tr. 52.) She testified she can no longer work because she is
12 "mentally unstable," does not like to be around people, and has
13 memory and concentration problems. (Tr. 52-53, 60.)

14 **ADMINISTRATIVE DECISION**

15 After summarizing the evaluation process used where there is
16 medical evidence of a substance abuse disorder, 20 C.F.R. §§
17 404.1535, 416.935, the ALJ proceeded with the first sequential
18 evaluation with the effects of DAA. At step one, the ALJ found
19 Plaintiff had not engaged in substantial gainful activity since
20 February 1, 2004, the alleged onset date. (Tr. 17.) At step two,
21 he found Plaintiff had the severe impairments of "substance
22 abuse/dependence disorders (cannabis and cocaine); a personality
23 disorder with paranoid, borderline, dependent and avoidant traits;
24 and a schizoaffective and/or depressive disorder by history." (Tr.
25 16.) The ALJ found indications of borderline intellectual
26 functioning were not supported by psychological evaluations and
27 tests and concluded many of Plaintiff's symptoms were those caused
28 by substance abuse. (Tr. 17.) He found evidence established

1 substance abuse as recent as October 2008, and during the period at
2 issue, "there was never even a two month period in which she was
3 clean and sober." (Tr. 21.) At step three, he determined
4 Plaintiff's impairments, including her substance abuse, met sections
5 12.04, 12.08, and 12.09 of listed impairments in 20 C.F.R., Part
6 404, Subpart P, Appendix 1 (Listings). (Tr. 20.)

7 Having thus determined Plaintiff was disabled with the effects
8 of ongoing substance abuse, the ALJ proceeded to the second
9 sequential evaluation without the effects of DAA and found if
10 Plaintiff stopped using, she would not have an impairment or
11 combination of impairments that meet a Listing. (Tr. 19.) He found
12 that without the effects of DAA, Plaintiff would have the residual
13 functional capacity (RFC) to perform "a full range of work at all
14 exertional levels with the following non-exertional limitations: no
15 detailed job instructions/tasks; no airborne pollutants such as
16 fumes, chemicals, dust, etc.; a drug/alcohol-free [work] environment
17 with limited superficial public contact." (Tr. 20.) He found with
18 this RFC, Plaintiff could still perform her past work as an
19 inventory clerk, a job that was performed at the medium level. (Tr.
20 22.) Proceeding to step five in the alternative, based on VE
21 testimony, the ALJ found without the effects of DAA, if Plaintiff
22 were restricted to light level work, there were other jobs she could
23 perform in the national economy, such as cashier, fast food worker,
24 and agricultural sorter. He found Plaintiff has not been abstinent
25 from DAA for any length of time, and DAA is a "contributing factor
26 material" to her disabling limitations." (Tr. 24.) The ALJ
27 concluded Plaintiff has not been "disabled" as defined by the Social
28 Security Act and 20 C.F.R. § 416.935 through the date of the

1 decision. (*Id.*)

2 ISSUES

3 The question is whether the ALJ's decision is supported by
 4 substantial evidence and free of legal error. Plaintiff argues the
 5 ALJ improperly rejected limitations assessed by the examining
 6 psychologist, disregarded opinions of the reviewing psychologist,
 7 and erroneously relied on medical expert testimony in finding she is
 8 not disabled without the effects of DAA. (ECF No. 14 at 7-13.)
 9 Defendant responds the ALJ's denial of benefits is supported by
 10 substantial evidence and free of legal error. (ECF No. 16.)

11 DISCUSSION

12 Plaintiff contends the ALJ did not give "specific" and
 13 "legitimate" reasons for rejecting the opinions of examining
 14 psychologist Scott Mabee, Ph.D. regarding her mental RFC. *Roberts*
 15 v. *Shalala*, 66 F.3d 179, 184 (9th Cir. 1995). She also argues the
 16 ALJ's failure to mention moderate limitations assessed by non-
 17 examining physician Eugene Kester, M.D., in July 2007, is cause for
 18 reversal. (ECF No. 14 at 12-13.)

19 A. Sequential Evaluation With the Effects of DAA

20 Plaintiff specifically takes issue with the ALJ's reliance on
 21 Dr. McKnight's non-examining medical expert testimony in lieu of
 22 crediting marked and severe limitations assessed by Dr. Mabee and
 23 moderate limitations assessed by Dr. Kester. (ECF No. 14 at 13.)
 24 However, review of the entire record and the decision shows the ALJ
 25 complied with the special Regulations and case law governing claims
 26 in which DAA is involved. In that context, the weight given Dr.
 27 Mabee's evaluations, Dr. McKnight's testimony, and Dr. Kester's RFC
 28 assessment is without error. (Tr. 17-19.)

1 In the first sequential evaluation considering the effects of
2 DAA, the ALJ discussed evidence from all three medical sources and
3 properly gave more credit to Dr. Mabee's examining opinions than Dr.
4 McKnight's and Dr. Kester's non-examining opinions.¹ Specifically,
5 the ALJ found Dr. Mabee's evaluations were conducted while Plaintiff
6 was actively abusing drugs (cannabis and cocaine). He credited Dr.
7 Mabee's assessment of marked and severe functional limitations and
8 found Plaintiff was disabled with the effects her polysubstance
9 abuse/addiction disorder. (Tr. 18-19.)

10 Although the ALJ does not reference Dr. Kester by name, he
11 specifically cites to Dr. Kester's evaluation and found, "As with
12 the state agency medical consultants (Exhibits 5F-9F), under
13 Criteria B for severity of functional limitations, even considering
14 her substance abuse/addiction disorders, Dr. McKnight opined that
15 the claimant has [moderate mental functioning limitations]." (Tr.
16 18, 283-300.) Independent review of the record shows Dr. Kester's
17 notes and RFC findings identify substance addiction as a mental
18 impairment causing multiple moderate limitations in concentration
19 and social functioning. (Tr. 285, 287, 299.) Thus, the ALJ
20 correctly acknowledged that both Dr. McKnight and Dr. Kester opined
21

22 ¹ The opinions of an examining physician generally are given
23 more weight than the opinions of a non-examining medical expert or
24 reviewing physician. However, a medical expert's opinions after a
25 review of the entire record may be considered substantial evidence
26 sufficient to reject an examining physician if his opinion is
27 supported by other medical evidence in the record. *Lester v.*
28 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

1 Plaintiff was moderately limited with the effects of DAA. *Id.*
2 However, based on all the evidence and considering Plaintiff's
3 substance addiction disorder, he concluded her impairments were
4 disabling. (Tr. 18.) Because the ALJ gave more weight to Dr. Mabee's
5 examining opinions than to the non-examining opinions of Drs.
6 McKnight and Kester, there is no legal error. *See Lester*, 81 F.3d
7 at 830 (examining physician opinion entitled to greater weight than
8 non-examining opinion). The ALJ's finding of disability with the
9 effects of DAA is supported by substantial evidence, is without
10 legal error, and complies with the Regulations and relevant case
11 law. 20 C.F.R. § 416.935; *Bustamante*, 262 F.3d at 755.

12 **B. Sequential Evaluation Without the Effects of DAA**

13 Having found Plaintiff was disabled with the effects of chronic
14 drug abuse and alcohol abuse, the ALJ correctly proceeded to the
15 second sequential evaluation to determine if Plaintiff's mental
16 impairments (personality disorder, schizo-affective and/or
17 depressive disorder by history) would be disabling without the
18 effects of DAA. (Tr. 19.) Assisted by Dr. McKnight, whose testimony
19 and opinions are supported amply by other evidence in the record,
20 the ALJ concluded symptoms associated with Plaintiff's mental
21 disorders are the same symptoms associated with DAA. (Tr. 17.)

22 Plaintiff's contention that Dr. Mabee's assessments in March
23 and May 2007 took into consideration her DAA, and thus establish
24 that DAA is not material to her diagnoses and/or symptoms is
25 unpersuasive. (ECF No. 14 at 12-13.)

26 The ALJ reasonably found Dr. Mabee's diagnoses of cocaine and
27 marijuana dependence "in early partial remission" are contradicted
28

1 by evidence of ongoing cocaine and marijuana use throughout the
2 medical records. (Tr. 17, 20-21, 246, 325.) For example, the
3 record shows Plaintiff was evaluated at Geiger Correctional Center
4 on March 15, 2007, after she was booked on February 13, 2007, for a
5 60-day sentence. (Tr. 17, 263-65.) Therefore, limitations assessed
6 at that time reflect her mental functioning after 30 days of
7 compelled abstinence. In May 2007, after release from Geiger,
8 Plaintiff was evaluated again by Dr. Mabee and associates. (Tr. 17,
9 244-48.) During the interview, she reported she had used cocaine
10 and alcohol since her last evaluation (March 2007), but claimed she
11 was clean and sober for 40 days. Plaintiff also reported she had
12 been in outpatient treatment for four or five days and was subject
13 to drug testing through that program, but testing results were not
14 submitted as requested by the ALJ during the hearing.² (Tr. 39,

16 ² Although Plaintiff reported abstinence and ongoing
17 hallucinations during her May 2007 evaluation, the ALJ discounted
18 subjective complaints of hallucinations and disabling limitations.
19 He found objective tests administered during the evaluation evidence
20 over-reporting and referenced numerous inconsistencies in her
21 actions and allegations and contradictions between her statements
22 and reports to the providers. (Tr. 17, 21, 246.) The ALJ's
23 credibility findings are unchallenged, and Plaintiff's unreliable
24 reports are not sufficient to establish a period of sobriety. In
25 addition, Plaintiff admitted to her medical providers she failed
26 multiple attempts of inpatient treatment and did not follow up with
27 outpatient treatment. (Tr. 315, 325.) Plaintiff's inability to
28 provide objective evidence of successful treatment and/or abstinence

1 245.) Further, a mental health assessment dated October 20, 2008
 2 documents Plaintiff's self report of long term drug use, recent
 3 drug-induced paranoia, and daily use of marijuana and cocaine use "a
 4 couple times a month" before her incarceration in August 2008. (Tr.
 5 235.) Plaintiff presents no documentation that any period of
 6 sobriety persisted long enough to establish disability without the
 7 effects of DAA during the relevant period. See 20 C.F.R. §
 8 416.920(a)(4)(ii)(a disabling impairment must meet duration
 9 requirement of at least twelve months); see also 20 C.F.R. § 416.501
 10 (SSI benefits not payable for period that precedes first month
 11 following application date). Because Dr. Mabee's reports do not
 12 reflect Plaintiff's condition without the effects of DAA, they are
 13 not probative to the second sequential evaluation, and the ALJ was
 14 not required to reject them. *Vincent v. Heckler*, 739 F.2d 1393,
 15 1394-95 (9th Cir. 1984).

16 The ALJ did not err in finding the record does not contain
 17 evidence that Plaintiff was clean and sober even for two months.
 18 (Tr. 21.) Plaintiff did not meet her burden to show DAA was not a
 19 contributing factor material to her disability, and the ALJ did not
 20 err with his second sequential evaluation without the effects of
 21 DAA.

22 **C. RFC Determination without the Effects of DAA**

23 The final determination regarding a claimant's ability to
 24 perform basic work is the sole responsibility of the Commissioner,
 25 involves consideration of the entire record, and includes
 26 limitations supported by competent evidence and credible testimony.

27 _____
 28 further supports the ALJ's denial of benefits.

1 20 C.F.R. §§ 416.927(e), .946(c); *Richardson*, 402 U.S. at 400;
2 *Andrews*, 53 F.3d at 1039; *SSR* 96-8p. *SSR* 96-5p. Conflicts in
3 medical testimony and ambiguities in the record are resolved by the
4 ALJ, and where his determination is a rational interpretation of the
5 evidence, the court may not substitute its judgment for that of the
6 Commissioner. *Tackett*, 180 F.3d at 1097.

7 Having determined Plaintiff's mental impairments without the
8 effects of DAA did not meet or equal a Listing, the ALJ found
9 Plaintiff had the remaining mental capacity to perform work tasks as
10 long as the work did not involve detailed instructions or tasks, or
11 more than limited, superficial contact with the public. (Tr. 20.)
12 His findings are supported by limitations assessed at Geiger
13 Corrections Center: *i.e.*, moderate limitations in the ability to
14 perform complex and detailed tasks; and moderate to marked
15 impairments in social relationships. (Tr. 265, 244.) The ALJ's RFC
16 determination without the effects of substance abuse takes into
17 consideration these limitations and Plaintiff's credited testimony
18 that she does not like to interact with others by restricting
19 Plaintiff to limited public interaction and unskilled work. (Tr. 22,
20 60.)

21 In addition, Dr. McKnight's testimony and opinions regarding
22 Plaintiff's bipolar disorder diagnosis and work-related limitations
23 support the ALJ's final RFC determination. His expert testimony is
24 supported by the record (which he references throughout his
25 testimony) and inferences reasonably flowing from the evidence;
26 therefore, his opinions are considered substantial evidence. *Lester*,
27 81 F.3d at 831; *Andrews*, 53 F.3d at 1041. As Dr. McKnight
28

1 testified, there is no treating medical source observation
2 confirming a diagnosis of bipolar disorder, and the diagnosis
3 reported in the record appears to be based on Plaintiff's self-
4 report or testing clearly compromised by ongoing, diagnosed
5 polysubstance abuse.³ (Tr. 32.) The record and Dr. McKnight also
6 indicate Plaintiff's problems with memory, focus, and depression are
7 overstated by Plaintiff and/or associated with drug abuse, a
8 combination that also compromises the conclusions and diagnoses
9 found in the Mabee reports. (Tr. 34, 35, 246, 273 (questionable or
10 invalid personality tests), 281 (memory observed as "grossly in
11 tact" by medical provider).)

12 The ALJ's RFC finding that Plaintiff can still perform her past
13 work reflects a reasonable interpretation of all the evidence, and
14 is supported by the record, including Plaintiff's documented work
15 experience as an inventory clerk, a job she stated she left due to
16 emergency surgery rather than any claimed disability. (Tr. 271.)
17 Plaintiff provides no evidence to undermine the ALJ's finding that
18 Plaintiff could still perform this work if she stopped the
19 documented substance abuse. Viewing the record in its entirety, the
20 ALJ's RFC determination is without error.

21 **CONCLUSION**

22 The Commissioner's denial of benefits is supported by

23
24 ³ As discussed above, diagnoses of alcohol and cocaine
25 addiction "in partial remission," are undermined by Plaintiff's
26 statements to providers. (Tr. 17, 35, 325.) Also, as noted by Dr.
27 McKnight, test scores relied upon by Dr. Mabee did not reveal memory
28 problems. (Tr. 33, 246, 264.)

1 substantial evidence and without legal error. Plaintiff failed to
2 carry her burden of proving DAA was not a contributing factor
3 material to a finding of disability; therefore she is not entitled
4 to disability benefits under the Social Security Act. Accordingly,

IT IS ORDERED:

6 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
7 **DENIED**;

8 2. Defendant's Motion for Summary Judgment (**ECF No. 15**) is
9 **GRANTED;**

10 3. Judgment shall be entered for Defendant.

11 The District Court Executive is directed to file this Order and
12 provide a copy to counsel for Plaintiff and Defendant and the file
13 shall be **CLOSED**.

14 DATED August 31, 2012.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE